MOTION FILED

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No. 97-1230

In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

vs.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ROBERT FLANDRICK
Counsel of Record
RUFUS C. YOUNG
Attorneys for Amici Curiae

BURKE, WILLIAMS & SORENSEN
611 West Sixth Street
Suite 2500
Los Angeles, California 90017
(213) 236-0600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, sixty-seven cities, counties and towns within the State of California respectfully move for leave to file the accompanying brief *amici curiae* in support of the petition in this case. These cities, counties and towns are listed in the Appendix to this brief. Counsel for petitioner has consented, but counsel for respondents has withheld consent.

February, 1998

Respectfully submitted,

Robert Flandrick
Rufus C. Young
Attorneys for Amici Curiae

QUESTIONS PRESENTED

1. Are municipal officials qualified and able to give the type of notice required by the Ninth Circuit in *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9)?

2. Did the Ninth Circuit correctly apply *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), to the facts of this case?

3. Does the Ninth Circuit's notice requirement have an adverse impact on municipal liability?

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AMICI CURIAE BRIEF OF SIXTY-SEVEN CALIFORNIA CITIES, COUNTIES AND TOWNS

INTEREST OF THE *AMICI CURIAE*

This brief is submitted with permission of the Petitioner City of West Covina on behalf of sixty-seven cities, counties and towns within the State of California as *amici curiae* in support of the Petitioner City of West Covina for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Perkins v. City of West Covina*, 113 F.3d 1004 (1997) (CA9). The names of the cities are attached as an Appendix to this brief.

Amici respectfully submit that the ruling of the Ninth Circuit Court of Appeals in *Perkins* imposes a substantial and impractical burden on local governments that is contrary to public policy and law. If allowed to remain as controlling law, the ruling in *Perkins* will require local governmental entities to provide substantive legal advice with regard to court procedures for obtaining return of legally-seized property to those individuals whose property has been taken pursuant to legitimate and valid search warrants. Under the guise of an expanded "notice" requirement, the court has set forth a requirement for police officers and other city officials who are not attorneys to provide legal advice on matters outside their knowledge or control. The ruling poses the risk of expanded liability for local public entities for the unauthorized practice of law, as well as setting up conflicting duties and obligations for local governmental employees.

Amici urge the Court to grant certiorari in this case and reverse the determination of the Court of Appeals.

ARGUMENT

I. The *Perkins* notice requirement imposes a duty on municipal officers who do not have legal training to provide legal advice contrary to law and sound public policy.

The primary flaw in the reasoning of the court in *Perkins* is the assumption that reasonable notice requires public officials to explain judicial procedures to those seeking to obtain return of property legally seized in the course of police investigations. Explanation of such procedures, which are established by the courts and not by municipalities, counties or towns, puts local officials in the position of rendering legal advice to individuals who are inherently adverse to the governmental entity served by such officials. Not only are untrained public employees required to give legal advice that could constitute the unauthorized practice of law, such employees are required to give advice that may be directly in conflict with the interests of the public entity which they are sworn to serve. The purported "notice" required by the court in *Perkins* goes far beyond standard notice requirements, and if allowed to stand, will place public employees in an untenable position.

A. The notice required by the court in *Perkins* goes beyond well-established standards for notice of constitutionally-protected rights.

Due process of law requires that an individual deprived of a constitutionally protected liberty or property interest be given notice and an opportunity to be heard before such deprivation becomes permanent. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). According to the

Court in *Matthews*, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Id.* at 333. However, due process "is not a fixed set of rights, it 'is flexible and calls for such procedural protections as the particular situation demands.' " *Anderson v. Nelson*, 352 F.Supp. 1124, 1128 (1972) (D.C.N.D. CA). Thus, the type of notice required by procedural due process varies according to the facts of each case.

The Supreme Court has established a constitutional minimum for sufficient notice. Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949). Additionally, "[t]he notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance." *Id.* Moreover, "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the grounds that it is in itself reasonably certain to inform those affected." *Id.* at 315. Thus, constitutionally-sufficient notice does not require that an individual be informed of his legal recourse in a particular situation, but merely that he be informed that an action is pending against him in a manner that allows him to defend against the action.

The Ninth Circuit has unduly expanded the concept of constitutionally-sufficient notice in *Perkins* by requiring that police officers give legal advice to the very individuals against whom such police officers act in

seizing property in connection with criminal investigations. The Court of Appeals stated that constitutionally-adequate notice,

> . . . must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned. (Petition at 5).

While much of this notice requirement appears to be reasonable, and in fact was complied with in *Perkins*, the language requiring information about the need for a written motion or request to the court goes beyond notice and extends into the realm of legal advice. Court procedures and requirements change and vary according to local rules. A requirement for a written motion might be required in one jurisdiction but not in another. To meet the notice requirement in *Perkins*, public entities must be continually updated and apprised of such procedures and must take responsibility for adjusting the notices given as changes in court-mandated procedures occur. Ordinarily, the responsibility for determining how to proceed rests with the individual and his or her legal adviser, not with local governmental officials.

Justice Stevens argued against exactly this type of detailed notice in his dissent in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). He stated that a more

detailed notice requirement "rests on a paternalistic predicate that I cannot accept." *Id.* at 26. Essentially, the question is whether the individual assumes responsibility for finding out what procedural rules apply, or whether governmental entities that do not set such rules must act *in parens patriae*. Historically, the Court has rejected the notion that government must take on such paternal responsibilities.

The facts of the *Perkins* case demonstrate the folly of attempting to make local government responsible for the proper assertion of individual rights. According to the California district court, "Perkins was told he needed a court order. He was told which court and judge to go to. It is not unreasonable to require him to submit some kind of written request in an attempt to test the adequacy of the procedure." (Petition at E-7). Additionally, the court found that Perkins did not make a concerted effort to get his property returned. It stated that he " . . . made one trip to the Municipal Court, was advised that there was no file in his name and ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures . . . "(Petition at E-7). Thus, Perkins' deprivation of property did not arise because of constitutionally-inadequate notice but because of his failure to initiate the judicial remedy available to him. Constitutionally-adequate notice in this case does not require the detailing of legal procedure nor advice on how to initiate this procedure. The failure on the part of the plaintiff to make the effort to properly assert his rights does not justify placing a constitutional burden on local government and police departments to provide legal

advice to individuals whose property has been seized pursuant to a search warrant.

B. Municipal officials and police officers are not qualified to give legal advice and any requirement that they do so is contrary to law and public policy.

Municipal officials who are non-lawyers are prohibited from giving the legal advice required by *Perkins*. According to California Business and Professions Code section 6126(a) (Deering 1997), any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor. The definition of the practice of law includes the giving of legal advice. For instance, in *People v. Merchants Protective Corp.*, 189 Cal. 531 (1922), the California Supreme Court held that a corporation comprised of non-lawyers could not, as its business, provide legal services to its members. These legal services included the giving of legal advice. According to the Court, " . . . under the laws of California, individuals may not, either singly or in association, engage in the practice of law without having a special license to do so." *Id.* at 533. Since *Perkins* requires municipal officials who are not lawyers to engage in the practice of law, it also requires that these officials violate the law.

Not only are municipal officials prohibited from giving legal advice, most are unqualified to do so. For instance, police officers are not qualified to give legal advice. California state law specifies minimum eligibility

requirements for police officers. To become a police officer, an individual must be a citizen of the United States who is at least 18 years of age and of good moral character (Cal. Gov't Code § 1031 (Deering 1997)). Additionally, an aspiring police officer must disclose any past criminal record he may have and must be free of any physical, mental, or emotional condition which might adversely affect his exercise of the powers of a peace officer. *Id.* Finally, an aspiring officer must have the equivalent of a high school diploma. *Id.* To become a police officer in California, an individual is not required either to be an attorney or to have any legal education or training. Thus, the giving of legal advice is beyond the expertise of police officers.

Perkins inappropriately requires police officers to provide legal advice to individuals whose property is seized pursuant to a search warrant. By providing this advice, police officers are legally assisting the same individuals they are collecting evidence against. Thus, the *Perkins* notice requirement creates a conflict of interest for police officers.

The ruling in *Perkins* contrasts dramatically with the care taken by the Supreme Court in crafting notice requirements in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). There, the Court carefully defined the contours of an individual's Fifth Amendment right not to incriminate himself when he is in police custody and required police officers to give only that information necessary to alert the individual to his rights. Specifically, the Court stated that " . . . [a] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he

has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

The Court went on to delineate the entirely different role of an attorney for the accused which may include advising his client not to talk to the police until he has an opportunity to investigate the case, or remaining with his client during police questioning. *Id.* at 480. The Court further stated that this role for the attorney " . . . is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under oath – to protect to the extent of his ability the rights of his client." *Id.* The Court's ruling in *Miranda* notes the distinction between the role of an attorney which is to give legal advice with regard to procedures and the duty of a police officer which is to give notice of the existence, rather than the legal parameters, of specific rights.

Under *Miranda*, police are required only to inform a suspect of his Fifth Amendment rights against self-incrimination. This notice alerts the accused that protection of these rights may require the presence of an attorney. Officers are not required to tell suspects about the legal remedies they may have, however, if their Fifth Amendment rights are violated. Nor does this notice inform individuals as to how they may initiate proceedings against the police if this constitutional deprivation occurs. If officers were forced to give suspects this information, they would be placed in the position of legally assisting the same individuals they are collecting evidence against. The *Perkins* decision confuses the role of

the police officer with the role of an attorney and by doing so creates a conflict of interest for these officers.[1]

In a municipality, the city attorney is the individual who advises city officials on all legal matters pertaining to city business (CAL. GOV'T CODE § 41801 (Deering 1997)). Thus, in order to fulfill the *Perkins* notice requirement, it could be argued that municipal officials and police officers should consult with the city attorney and ask the city

[1] The *Perkins* decision also poses problems in the unusual situation where a police officer also happens to be a licensed attorney. Two sections of the California Government Code apply to peace officers who are also attorneys at the county level. One section of the code states that sheriffs, clerks, constables, or any of their deputies shall not practice law (CAL. GOV'T CODE § 24004). An exception to this rule exists for deputy sheriffs. A deputy sheriff may practice law if he gives legal advice to his employer that is within the course and scope of his employment or if he represents an individual in civil matters with which the deputy sheriff does not have or will not have any association (*Id.* 24004.5).

If peace officers at the county level who are also attorneys are required to give legal advice to individuals whose property has been seized they will violate the California Government Code. Although deputy sheriffs may give legal advice in limited instances, they may not give legal advice to anyone who is not their employer. An individual whose property is seized pursuant to a search warrant is not a deputy sheriff's employer. Additionally, if the deputy sheriff seized the property or performed any act relating to the seizure of the individual's property, he is prohibited from giving legal advice to that individual. Thus, the *Perkins* notice requirement forces peace officers who are also attorneys to choose between violating either California's Government Code or judicially-created law.

attorney to provide the required legal advice. This consultation is required under the municipal government scheme.

However, this consultation is inappropriate in cases where a municipal officer seeks advice from the city attorney for an individual who has violated a city ordinance or is accused of a crime. A city attorney may not assist in the defense of an individual who has violated any ordinance of the city he represents. This rule applies regardless of whether the city attorney has prosecutorial responsibilities on behalf of the city by which he is employed (*Id.* § 41805). Additionally, if the city attorney has prosecutorial responsibilities, he may not defend or assist in the defense of persons accused of crimes. *People v. Rhodes*, 12 Cal. 3d 180, 187 (1974). This rule is a judicially-created rule of criminal procedure. *Id.* at 186.

These limits on a city attorney's powers coupled with the *Perkins* notice requirement create a conflict for city attorneys. Individuals most likely to sue a municipality for failure to provide constitutionally-adequate notice that resulted in a deprivation of a liberty or property interest are individuals who have violated a city ordinance or are accused of a crime. For instance, most individuals whose property is the subject of a search warrant are criminal suspects. If a criminal suspect's property is seized pursuant to a search warrant and he is not home when the seizure occurs, *Perkins* requires that police officers provide this suspect with notice of the seizure that contains legal advice. If a police officer contacts the city attorney to obtain this advice, and the city attorney has

prosecutorial responsibilities, the city attorney will violate a rule of criminal procedure if he provides this advice. If the city attorney refuses to provide this legal advice, he puts the police officer, an individual with no formal legal training, in the position of having to provide this advice or incur municipal liability.

In a municipality, many roles assumed by public employees involve dealing with the public in areas where legal issues arise. Because governmental officials are not trained legal advisors, statutory provisions have been enacted strictly limiting public employees with regard to providing the public with legal advice as to how to proceed in various matters. City clerks, for example, are required to give information with regard to a wide variety of matters that involve legal consequences for individuals. For instance, election deadlines have serious consequences for individuals seeking public office. Nevertheless, it is well established that where any question arises as to legal procedures, city clerks decline to advise individuals on such matters because to do so would be to give legal advice, rather than just public notice.

California law does not require that city clerks be attorneys nor have any legal education. Under general California law, city clerks are elected by city electors (CAL. GOV'T CODE § 36503 (Deering 1997)). To be elected as a city clerk, an individual may not be an elector of the city and must have resided in the electing city for the year preceding his election (*Id.* § 36502). These eligibility requirements do not mandate that a city clerk have any legal education. Thus, city clerks are generally not qualified to give legal advice and are prohibited from doing so

under the provisions of California Business and Professions Code section 6126(a) (Deering 1997).

Additionally, the California state legislature has prescribed the duties of city clerks in the state's Government Code.[2] The pertinent sections of this code do not authorize city clerks to give legal advice. Additionally, city clerks do have duties that pertain to the judicial system. They maintain books with city ordinances and may take and certify affidavits and depositions. However, these duties do not require that clerks either interpret or advise individuals about the law. After *Perkins*, in order to avoid

[2] According to the Code, these duties are as follows: 1) City clerks maintain accurate records of the proceedings of the city's legislative body and board of equalization (CAL. GOV'T CODE § 40801); 2) City clerks act as accounting officers of the city and maintain records of the financial codes of the cities (*Id.* § 40802); 3) City clerks summarize the city's financial report and publish it in a paper of general circulation or post the report in public places (*Id.* § 40803); 4) City clerks keep a book marked "ordinances" and record in it all city ordinances with his certification annexed to each, stating: (a) It is a true and correct copy of a city ordinance; (b) The ordinance number; and (c) It has been published or posted pursuant to law (*Id.* § 40806); 5) City clerks are the *ex officio* assessors unless the legislative body provides for the assessment and collection of city taxes by county officers or otherwise (*Id.* § 40810); 6) City clerks are custodians of the city seal (*Id.* § 40811); 7) City clerks may have additional duties as prescribed by statute (*Id.* § 40812); 8) City clerks may appoint deputies (*Id.* § 40813); 9) City clerks and their deputies may administer oaths or affirmations and take and certify affidavits and depositions pertaining to city affairs and business which may be used in any court proceeding in the state (*Id.* § 40814).

municipal liability, city clerks will go beyond the scope of their statutorily-defined duties and provide legal advice on judicial procedure.

City clerks are less conversant with judicial procedure than clerks of court. Yet, clerks of court are prohibited from interpreting judicial procedure. Clerks of court have no judicial authority unless the constitution or legislature provides them with this authority. *See People v. Kuder*, 90 Cal. App. 594 (1928) (where the court stated, "It has uniformly been held that ordinarily the clerk of court is but a ministerial officer and is clothed with no judicial powers." *Id.* at 600.) Generally, a clerk of court has no authority to hear evidence, to determine whether a demurrer or answer has been served on an attorney, to construe pleadings or rights thereunder, or to pass on whether an answer to a complaint is defective, irregular, or insufficient to constitute a defense. 12 CAL. JUR. 3D *Clerks of Court* § 1 (1972). These prohibitions on a clerk's exercise of his authority indicate that a clerk of court should not interpret legal procedure. If a clerk of court should not interpret legal procedure, it follows that a city clerk, who has less knowledge about legal procedure than a clerk of court, should not give legal advice on this procedure.

II. *Memphis Light's* notice requirement applies to municipally-created and controlled dispute resolution procedures, not to judicial procedures.

In *Perkins*, the Ninth Circuit justified its new notice requirement on the basis of *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978). In *Memphis Light*, the

Supreme Court required a municipal utility company to provide information to its customers about its own internal dispute resolution procedures. These procedures were essentially created by the municipality since the utility company functions under the ultimate control of the municipal government.[3] Thus, provision of notice to a customer which "inform[s] the customer not only of the possibility of termination but of a procedure for challenging a disputed bill," *Id.* at 12, does not require that a municipal utility company inform itself of dispute resolution procedures outside of its control or expertise.

However, the Ninth Circuit in *Perkins* used the Court's holding in *Memphis Light* to force municipal agencies, police departments, to inform individuals about judicial remedies which they did not create and do not control. Specifically, the Ninth Circuit required that the police provide notice that "inform[s] the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court." (Petition at 5). Unlike the municipal utility company in *Memphis Light*, the police department did not create the judicial procedures available to aggrieved individuals. These procedures are not dispute resolution procedures internal to the police department but local-law remedies. These local-law remedies are contained in the

[3] In *Memphis Light*, the Court indicated that, "Memphis Light, Gas and Water Division (MLG&W) is a division in the city of Memphis which provides utility service. It is directed by a Board of Commissioners appointed by the City Council, and is subject to the ultimate control of the municipal government." *Id.* at 1.

California Penal Code and were created by the state legislature, not the municipal government. Thus, the municipality does not have ultimate control over these procedures. The *Perkins* notice requirement goes beyond Supreme Court's notice requirement in *Memphis Light*.

Not only does the *Perkins* notice requirement expand the concept of constitutionally-adequate notice, it also expands it in a manner rejected by the Court in *Memphis Light*. In this case, the plaintiffs could have pursued their remedy either through the municipal utility company or the court system. Although the Court required that the municipal utility company provide information to the plaintiffs on their internal dispute resolution procedures, it did not require that the municipal utility company provide information to the plaintiffs on local-law remedies. The Court mentioned the availability of these judicial remedies, stating, "An aggrieved customer [of a municipal utility company] may be able to enjoin a wrongful threat to terminate, or to bring a subsequent action for damages or a refund. The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light*, 436 U.S. at 11. However, the Court did not require that the municipal utility company inform the aggrieved customer of these legal remedies. According to Justice Stevens' dissent, the Court wisely avoided requiring that municipal utility companies provide this type of "legal advice" to customers. *Id.* at 26. Thus, *Memphis Light* implies that municipalities should not be required to give legal advice on judicial remedies. The Ninth Circuit ignored this implication when it asserted that constitutionally-adequate notice requires a municipality to offer legal advice.

III. The *Perkins* notice requirement unduly increases municipal liability.

The *Perkins* decision unduly and unjustly increases municipal liability and exposure to claims. Under *Perkins*, police departments will be required to provide legal advice to individuals whose property is seized pursuant to a search warrant in order to avoid liability under section 1983. Civil rights litigants may use the *Perkins* decision as precedent to argue in other factual settings that police action deprived them of a liberty or property interest and that the police's notice with regard to this deprivation did not contain the adequate legal advice. If police departments do not accurately predict the factual circumstances in which a plaintiff could successfully make this argument, municipalities will face greater liability.

Police departments are not the only municipal agencies affected by the *Perkins* decision. If this decision is interpreted broadly by the courts, all municipal agencies will be subject to this same notice requirement if agency action deprives an individual of a constitutionally-protected liberty or property interest. Thus, if these agencies fail to give an affected individual notice with adequate legal advice they may be held liable under a section 1983 action.

CONCLUSION

The ruling of the Ninth Circuit Court of Appeals in *Perkins* is ill-conceived and far too broad in its implications for local government and local police departments. Rather than establishing a simple *Miranda*-like notice requirement, the court has imposed a duty on local government and police officers to provide substantive legal advice to the very individuals against whom action has been taken. Further, the advice that must be given concerns procedures that are established, implemented and controlled by the courts, not by local governmental entities. Such procedures are subject to change without notice to local government employees or police officers, and simply being certain that the advice given under *Perkins* continues to be correct imposes a substantial burden on local government.

If change in the existing notice requirements is warranted, then it would be prudent to limit that change to a simple statement that any individual deprived of property pursuant to a legitimate search warrant has the right to contact an attorney for assistance in recovering such property.

Any additional requirement that a local governmental agency advise individuals with regard to court procedures available for the recovery of property would pose an undue burden on local government and would expose governmental entities, funded by taxpayers, to unnecessary and unwarranted liability for their actions in attempting to comply with the requirements set forth in *Perkins*.

Accordingly, we respectfully request the Court to grant certiorari and urge reversal of the decision of the Court of Appeals.

Respectfully submitted,

ROBERT FLANDRICK
RUFUS C. YOUNG
BURKE, WILLIAMS & SORENSEN
Attorneys for Amici Curiae

APPENDIX

LAW OFFICERS OF CITIES SUBMITTING BRIEF
AMICI CURIAE

City of Alameda – Carol A. Korade, City Attorney

City of Anaheim – Jack L. White, City Attorney

City of Avalon – Pamela Albers, City Attorney

City of Bakersfield – Judy K. Skousen, City Attorney

City of Barstow – Michael G. Colantuono, City Attorney

City of Benicia – Heather C. McLaughlin, City Attorney

City of Burbank – Terry B. Stevenson, City Attorney

City of Carlsbad – Ronald R. Ball, City Attorney

City of Chino – Jimmy L. Gutierrez, City Attorney

City of Chula Vista – John M. Kaheny, City Attorney

City of Coachella – Jimmy L. Gutierrez, City Attorney

City of Colma – Roger C. Peters, City Attorney

City of Corcoran – Michael N. Nordstrom, City Attorney

City of Cotat – Jeffrey A. Walter, City Attorney

City of Dunsmuir – Elizabeth K. McCarthy, City Attorney

City of El Cajon – Lynn R. McDougal, City Attorney

City of Eureka – David E. Tranberg, City Attorney

City of Fremont – Harvey E. Levine, City Attorney

City of Gardena – Lisa Kranitz, City Attorney

City of Glendale – Scott H. Howard, City Attorney

City of Gustine – Francis R. Ruggieri, City Attorney

City of Hayward – Michael O'Toole, City Attorney

City of Hollister – Elaine M. Cass, City Attorney

City of Lafayette – Charles J. Williams, City Attorney

City of Laguna Beach – Philip D. Kohn, City Attorney

City of Loma Linda – Richard E. Holdaway, City Attorney

City of Los Alamitos – Thomas W. Allen, City Attorney

City of Los Altos – Robert K. Booh, Jr., City Attorney

City of Los Angeles – James K. Hahn, City Attorney

City of Madera – Joseph Soldani, City Attorney

City of Merced – Steven F. Nord, City Attorney

City of Montclair – Diane Robbins, City Attorney

City of Montebello – Jonathan B. Stone, City Attorney

City of Monterey – William B. Conners, City Attorney

City of Monterey Park – Anthony Canzoneri, City Attorney

City of Napa – Thomas B. Brown, City Attorney

City of Needles, Robert W. Hargreaves, City Attorney

City of Novato – Jeffrey A. Walter, City Attorney

City of Palm Desert – David J. Erwin, City Attorney

City of Redondo Beach – Jerold A. Goddard, City Attorney

City of Rialto – Robert A. Owen, City Attorney

City of San Buenaventura – Donna Laderos, City Manager

City of San Bruno – Jonathan P. Lowell, City Attorney

City of San Diego – Leslie E. Devaney, Executive Assistant City Attorney

City of San Luis Obispo – Jeffrey G. Jorgensen, City Attorney

City of San Pablo – Brian M. Libow, City Attorney

City of San Rafael – Gary T. Ragghianti, City Attorney

City of Santa Paula – Phillip H. Romney, City Attorney

City of Simi Valley – John Torrance, City Attorney

City of Stanton – Thomas W. Allen, City Attorney

City of Sunnyvale – Valeria J. Armento, City Attorney

City of Tracy – Debra E. Corbett, City Attorney

City of Twentynine Palms – A. Patrick Munoz, City Attorney

City of Vacaville – Charles O. Lamoree, City Attorney

City of Vallejo – John M. Powers, City Attorney

County of Calaveras – Spencer B. Batchelder, County Counsel

County of Kern – Bernard C. Barmann, Senior, County Counsel

County of Lake – Cameron L. Reeves, County Counsel

County of Merced – Dennis L. Myers, County Counsel

County of Modoc – Hugh Comisky, County Counsel

County of Mono – Marshall S. Rudolph, County Counsel

County of San Diego – Morris G. Hill, Deputy County Counsel

County of Shasta – Karen Keating Jahr, County Counsel

County of Tulare – Kathleen Bales-Lange, County Counsel

Town of Corte Madera – Jeffrey A. Walter, Town Attorney

Town of Ross – Hadden Roth, Town Attorney

Town of San Anselmo – Hadden Roth, Town Attorney

Town of Tiburon – Ann R. Danforth, Town Attorney